BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAY M. JOHNSON	)	
Claimant	)	
	)	
VS.	)	
	)	
UNITED EXCEL CORPORATION	)	
Respondent	)	Docket No. 1,002,022
	)	
AND	)	
	)	
BUILDERS' ASSN. SELF-INS. FUND	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the May 19, 2004 Award by Administrative Law Judge Steven J. Howard. The Board heard oral argument on September 8, 2004.

APPEARANCES

David R. Hills of Lenexa, Kansas, appeared for the claimant. Wade A. Dorothy of Lenexa, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed claimant's functional impairment is 25 percent.

ISSUES

The Administrative Law Judge (ALJ) found the claimant suffered a 82.95 percent work disability based on a 93.5 percent task loss and a 72.4 percent wage loss.

The respondent requests review of nature and extent of claimant's disability. Initially, respondent argues claimant failed to establish his current condition was caused by the admitted work accident. If it is determined the claimant's condition is causally related to his work-related accident, the respondent argues claimant was provided accommodated work within his restrictions and claimant failed to make a good faith effort to retain employment. Consequently, respondent argues claimant's compensation should be limited to his 25 percent functional impairment rating.

If it is determined claimant is entitled to a work disability, respondent argues claimant failed to meet his burden of proof to establish a task loss and the work disability should be calculated based upon a 0 percent task loss averaged with the 72.4 percent wage loss which is not disputed. Accordingly, respondent concludes claimant's work disability should be reduced to 36.2 percent.

Claimant argues that respondent's stipulation to compensability of the claim necessarily includes the admission that claimant's condition was caused by the admitted work-related injury. If not, claimant argues that fairness would require the Board to remand the case to the ALJ so that additional evidence regarding causation could be taken and presented to the ALJ for his determination of that issue. Nonetheless, claimant further argues that Dr. Daniel D. Zimmerman's June 19, 2003 report establishes causation between claimant's work-related accident and his resulting disability.

Claimant next argues he made a good faith effort to return to work for respondent but the work was beyond the restrictions imposed by Dr. Edward J. Prostic. And claimant notes that Dr. Prostic opined the work appeared to be beyond his restrictions. Accordingly, claimant requests the Board to affirm the ALJ's finding that he made a good faith effort to return to work and is entitled to a work disability.

Finally, claimant argues he provided an accurate task list which Dr. Prostic utilized to provide a task loss opinion and the Board should affirm the ALJ's determination of work disability in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a construction laborer for respondent. Claimant alleged and it was stipulated that he suffered repetitive injury to his back through his last day worked on April 13, 2002. Treatment was provided and ultimately, Dr. Charles M. Striebinger performed surgery on claimant on April 29, 2002, which consisted of anterior arthrodesis with cages at L4-5. Because claimant's condition did not improve a second

surgery was performed on August 28, 2002, which consisted of pedicle screw and rod fixation at L4-5.

In February 2003, Dr. Striebinger released claimant to return to work four hours per day for two weeks. Respondent placed claimant in a job which required that he stand in front of a door and advise pedestrians that they could not enter a construction area at KU Medical Center. Claimant experienced pain from standing and worked two days but only worked three hours the third day. Claimant told his supervisors that he would be unable to continue performing that job. Dr. Striebinger again took claimant off work for an additional period of time.

In October 2003, claimant was again released to return to work and assigned duties performing basic clean up which consisted of sweeping, mopping, vacuuming and rolling up extension cords. Claimant noted the sweeping and mopping required forceful pushing and pulling as well as bending and twisting at the waist. Claimant performed this work for two days and a few hours the third day. Claimant told his supervisor that his activities were causing back pain and was told to go home and see the doctor.

Because Dr. Striebinger was on vacation the claimant saw his family physician who advised him not to work. Claimant attempted to return to Dr. Striebinger but was told that the doctor would not see him because he had determined claimant had reached maximum medical improvement.

When claimant had returned to work in October 2003, he initially was assigned to KU Med Center and reported to Billy McCormick. Claimant and Mr. McCormick discussed his restrictions that had been provided by Dr. Prostic. Claimant testified that he told Mr. McCormick that the work required him to exceed Dr. Prostic's restrictions. The following day the claimant was assigned to work at Providence Medical Center and he reported to Chuck Baxter. Claimant testified that he was directed to clean designated areas. Claimant further testified that he told Mr. Baxter that the work required him to exceed Dr. Prostic's restrictions.

Claimant further testified that neither Mr. Baxter nor Mr. McCormick could believe that claimant was back at work because of his physical condition. Claimant agreed that he signed a document that he worked within his restrictions but noted that he was forced into signing even though he did not agree with the statement. Claimant testified:

> Q. How did Mike Cullinane force you to do that?
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> A. He told me, he handed me the sheet, told me to read it and sign it. And I told him that I would rather not sign it, I said, "because I'm not really in agreement with what it says," and it was left at that. Towards the end of the day he came back with the sheet and he said, "Just sign it." He said, "It's just paperwork for the office. We all got something we've got to do. Just sign it." And I was basically pressured into,

> you know, I can't tell a superior "no" and I was forced to sign it. I tried to contact Mr. Hills, who was out, and I was in total disagreement with this.[1]

William McCormick, a field manager and project superintendent for respondent, testified that he was in charge of a crew working at the KU Medical Center in October 2003. Mr. McCormick had been told that claimant was assigned to work there and because claimant had restrictions he was to work within those restrictions. Mr. McCormick told claimant to work within his restrictions, not overexert, and if he started hurting to sit down. Mr. McCormick denied claimant said that his work caused him to exceed his restrictions. Mr. McCormick agreed that claimant's clean up work required bending and lifting but he denied it was continuous. Mr. McCormick also agreed that claimant was continuously sweeping and mopping but said claimant did so within the restrictions.

Chuck Baxter, a construction superintendent for respondent, testified that he supervised work crews at Providence Medical Center in October 2003. Mr. Baxter noted that he was told claimant had work restrictions before claimant came to work. Mr. Baxter testified he told claimant not to work outside his restrictions. Mr. Baxter denied claimant told him the work was outside his restrictions. But he agreed claimant told him he was hurting and so Mr. Baxter sent claimant home. The next day claimant just worked a few hours and again told Mr. Baxter he was in pain. Mr. Baxter sent claimant home and noted he would not make claimant work if he was hurting himself.

Mr. Baxter also looked at the task list prepared by claimant and disagreed that the job with respondent required a minimum of 50 pounds of force or 50-pound lifting requirements. But Mr. Baxter noted the job could at times require claimant to exceed those stated amounts. Mr. Baxter indicated claimant performed constant sweeping and vacuuming the day he worked.

Troy Bechtel, senior project manager for respondent, testified that respondent does hospital construction, mainly remodeling. Clean up is a continuous requirement during hospital construction in order to meet infectious disease control guidelines. Mr. Bechtel advised Mr. McCormick to keep claimant busy but to work him within Dr. Prostic's restrictions. Claimant was then reassigned to Providence Medical Center and Mr. Bechtel told Chuck Baxter that claimant would be reporting to work and that he had restrictions. Mr. Bechtel agreed that the clean up work required continuous sweeping and mopping. And that claimant would have been required to continuously sweep and mop.

Dr. Edward J. Prostic examined claimant on September 3, 2003, at the ALJ's request. Dr. Prostic noted claimant suffered a series of injuries as a heavy equipment operator. Dr. Prostic opined claimant has a 25 percent permanent partial functional

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[1] R.H. Trans. at 23.

impairment pursuant to DRE Lumbosacral Category V of the AMA *Guides*[2]. Dr. Prostic imposed restrictions against lifting weights greater than 25 pounds occasionally or 10 pounds frequently; avoidance of more than occasional bending or twisting at the waist; avoidance of forceful pushing or pulling; avoidance of using vibrating equipment and avoidance of captive positioning. The doctor further explained that claimant could do intermittent bending throughout the day for short time periods. And he could do some pushing and pulling but not repetitious or forceful pushing or pulling. Finally, he explained claimant would need to be able to change positions as needed when sitting or standing.

Upon a review of claimant's description of his work activities when he attempted to return to work for respondent, Dr. Prostic concluded claimant's activities would seem to be beyond the doctor's restrictions. Mr. McCormick reviewed the same testimony and concluded it represented a true and correct description of claimant's job activities. Mr. Baxter reviewed the same testimony and disagreed with the weight of the cast iron pipes that were lifted but agreed claimant was sweeping and vacuuming all the time he worked.

At the request of claimant's attorney, Dr. Daniel D. Zimmerman examined the claimant on June 19, 2003. Dr. Zimmerman noted claimant developed pain and discomfort affecting the lumbar paraspinous musculature associated with various incidents of injury in his employment. Dr. Zimmerman further opined claimant suffered a 25 percent permanent partial functional impairment based upon the AMA *Guides*. The doctor specifically noted the impairment was due to lumbar disk disease at L4-5 which was permanently aggravated by claimant's work duties with respondent. Dr. Zimmerman imposed restrictions of lifting 10 pounds occasionally and 5 pounds frequently. The doctor further noted claimant should avoid bending, stooping, squatting, crawling, kneeling, and twisting activities at the lumbar level. Lastly, the doctor noted claimant should alternate positions after sitting for 15 minutes or standing for 5 minutes.

Initially, the respondent argues claimant failed to establish that his diagnosed condition was caused by the admitted work-related repetitive accidents. Conversely, claimant argues that respondent's stipulation as to compensability necessarily includes an admission regarding causation of his condition.

When the ALJ ordered the independent medical examination of claimant by Dr. Prostic, the ALJ specifically admonished the doctor not to address the issue of causation. It is inexplicable why the causation for the diagnosed condition would not be a logical issue to request the doctor to address. The better practice would be to obtain a causation opinion which the ALJ could then factor together with the entire evidentiary record to determine whether such condition was caused by the work-related injury. But because of the ALJ's direction, Dr. Prostic never questioned the claimant in detail regarding his history

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[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

of injury nor would the doctor offer a causation opinion regarding claimant's current condition. As a result, respondent argues claimant failed to establish the cause for his condition.

This argument overlooks the fact that claimant testified regarding the onset of his back complaints and their relation to his work activities. The claimant's testimony alone is sufficient evidence of his physical condition.[3] Moreover, Dr. Zimmerman testified that claimant's work activities with respondent permanently aggravated his L4-5 lumbar disk disease. The claimant has met his burden of proof to establish that his work activities caused permanent aggravation to his lumbar disk disease.

It should be noted that respondent's stipulation that claimant suffered accidental injury arising out of and in the course of employment is not a stipulation to the nature and extent of the disability caused by the accident. That issue was disputed. Although respondent admitted the compensability of claimant's injury such admission did not eliminate claimant's burden of proof to establish that his resulting disability was caused by the admitted accident.

Respondent next argues claimant did not make a good faith effort to retain accommodated employment provided by the respondent and as a result claimant should be limited to his functional impairment.

The Kansas Appellate Courts have interpreted K.S.A. 44-510e(a) to require workers to make a good faith effort to continue their employment post injury. The Court has held a worker who is capable of performing accommodated work should advise the employer of his or her medical restrictions and should afford the employer a reasonable opportunity to adjust the job duties to accommodate those restrictions. Failure to do so is evidence of a lack of good faith.[4] Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker refuses to attempt or voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.[5]

But where the accommodated job is not within the medical restrictions or where the worker is fired after attempting to work within the medical restrictions and experiences

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[3] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P. 3d 1184(2000), *rev. denied* 270 Kan. 898 (2001).

[4] See, e.g., *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999), and *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998).

[5] *Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* 265 Kan. 884 (1998).

increased symptoms an award of a work disability is appropriate.[6] Consequently, a claimant would not be limited to his functional impairment where he attempted the offered work and was not able to perform the work because of his work-related injury.[7]

In this case the claimant was determined to have reached maximum medical improvement and was released with permanent restrictions. The claimant attempted to return to work and perform the job that respondent provided. It is undisputed that claimant could not continue working because such activity caused his pain to return. And claimant was told by his supervisor to go back to the doctor. Because the authorized treating physician was on vacation claimant went to his personal physician and was again taken off work. Moreover, Dr. Prostic opined that the job activities requiring sweeping and vacuuming while continuously standing appeared to violate the physical activity restrictions he had placed on the claimant. The Board concludes claimant made a good faith effort to return to work for respondent and denies respondent's request to limit claimant to his functional impairment.

After claimant attempted to return to work for the respondent he did not thereafter seek work and the ALJ imputed a wage of $7.50 an hour. Neither party disputes this finding which resulted in a 72.4 percent wage loss.

The claimant's work disability is determined by averaging the task loss with the wage loss.[8]

Respondent's final contention is that claimant failed to meet his burden of proof to establish a task loss. The claimant prepared a list of job tasks that he had performed in the 15 years before the accident. Dr. Prostic opined that, after elimination of duplicative tasks, the claimant could now perform 2 out of 31 tasks which results in a 93.5 percent task loss. The ALJ adopted that task loss percentage. The Board agrees and affirms.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Steven J. Howard dated May 19, 2004, is affirmed.

IT IS SO ORDERED.

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[6] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[7] *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

[8] K.S.A. 44-510e(a).

Dated this 30th day of September 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: David R. Hills, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director